

only eight optional services on the basic service tier, all of which "would have to be dropped if the system is required to double the number of channels carrying broadcast services in order to comply with a digital must-carry requirement," in addition to six services on the CPST tier that would also have to be dropped.⁴⁵

Moreover, programming networks that are affiliated with cable operators are not automatically guaranteed adequate distribution, especially where the cable operator owns only a minority interest. It is highly unlikely that a network's cable owners or investors could provide distribution to the 25 to 30 million subscribers needed to sustain a cable network. For example, the total subscribership of Outdoor Life's and Speedvision's cable operator investors is approximately 12 million subscribers; the total number of subscribers served by cable investors in GAC is 1.2 million and in Knowledge is 1.3 million; and Golf's cable investors serve 5 million subscribers. Even if these cable operators agreed to distribute their affiliated networks on all of their respective cable systems, which they have not -- and because of existing regulatory and contractual obligations could not -- the number of subscribers would still fall far short of the number needed to generate a profit (25 to 30 million), let alone recover accumulated debt.

IV. A DIGITAL MUST-CARRY REQUIREMENT WOULD SEVERELY JEOPARDIZE COMMENTERS' ABILITY TO BECOME AND REMAIN COMMERCIALY VIABLE, CONTRARY TO THE PUBLIC INTEREST.

At the outset of the NPRM, the Commission acknowledged its statutory obligation to minimize the disruption and costs to cable programmers. And yet, the remaining text essentially ignores the impact of digital must-carry on cable television networks. Quality developing programming networks such as Commenters cannot withstand *any* reduction in channel

⁴⁵*Id.*

availability on cable systems. Cable networks' business plans are based on increases, not decreases, in available channels. Nevertheless, a digital must-carry requirement threatens to reduce extant channel capacity substantially, and to force cable operators to replace developing, niche networks, such as Commenters, with duplicative broadcast signals. Clearly, such a result is contrary to the public interest.

A. A Digital Must-Carry Requirement Will Directly And Dramatically Reduce Already Scarce Extant Channel Capacity.

The Commission states in the NPRM that there were 1,579 full power broadcast television stations as of May 31, 1998, and that there could be up to 3,200 broadcast operations in the last few years of the transition to digital broadcast television.⁴⁶ However, even the Commission's daunting estimate, which presumes that all broadcasters will opt to transmit only one HDTV signal using the additional spectrum, is too conservative. In reality, many broadcasters may opt to transmit their signals in standard definition, multiplex format, and create up to four new additional signals.⁴⁷ Thus, while the actual impact on channel capacity is yet unknown, it is certainly possible that if the Commission were to impose a digital must-carry requirement, must-carry demands would not merely double, but increase by an even more substantial measure, over the next several years.

⁴⁶NPRM at ¶ 9 n. 40.

⁴⁷See NPRM at ¶ 9 (under rules governing transition from analog to digital transmission, stations have flexibility to broadcast in a high definition mode, in a multiple program standard definition mode, or a mixture of both). The broadcast industry has indicated that it intends to increase definition slightly, but that it will probably transmit multiple channels, presumably to generate additional revenues. *Eisner Questions Need For TV Affiliates*, COMMUNICATIONS DAILY, Oct. 5, 1998, at 1 (Disney Chairman Mike Eisner, projecting five years out, expressed ABC's intent to use digital spectrum to multiplex and time shift).

No matter what transmission mode the broadcasters choose, however, any increase in cable systems' must-carry obligations will result in a directly proportionate reduction in available channel capacity. The majority of the nation's cable television systems are channel-locked.⁴⁸ Channel-locked systems will be forced to drop existing channels.⁴⁹ As one of the nation's largest cable operators described the situation, "if we go to add something . . . we've got to drop something."⁵⁰ Indeed, the Commission acknowledges that to the extent that it imposes a digital must-carry requirement, cable operators could be required to carry "double the amount of television stations, that will eventually carry identical content," while having to drop various and varied cable programming services.⁵¹ Even those cable systems that are not technically "channel-locked" because they have invested in system rebuilds and upgrades, or in digital compression, will be forced to fill any extant channel capacity with duplicative digital broadcast signals. Any channels that remain unfilled by digital must-carry signals will hardly accommodate the over 300 existing and planned cable networks competing for carriage.

⁴⁸See NPRM at ¶ 45 (two-thirds of nation's cable systems channel locked); Robert Kapler, *Cable Has No Space for Digital*, TV TECHNOLOGY, May 18, 1998, at 10 (according to NCTA, "[m]ost cable systems would have to drop one analog channel for each digital channel carried"); Linda Moss, *Small Ops See 'Difficult' 1999*, MULTICHANNEL NEWS, Aug. 10, 1998, at 8 ("channel-locked small operators are also worried about the impact of any digital must-carry for broadcasters' digital networks").

⁴⁹Doug Halonen, *FCC Jumps Into Digital Must-Carry Debate*, ELECTRONIC MEDIA, July 13, 1998, at 1A ("This 'double dose' of must-carry would surely result in cable networks being dropped in many places and would once again relegate cable networks to second-class citizenship," said NCTA President Decker Anstrom). Indeed, Senate Commerce, Science and Transportation Committee Chairman John McCain (R. Ariz.) cautioned the Commission to weigh concerns about existing channels' being dropped to make way for digital programming. *Id.*

⁵⁰Stewart Yerton, *Channels Slugging It Out For Viewers At N.O. Show*, THE TIMES-PICAYUNE, March 18, 1997, at C-1 (quoting Steve Sawyer, spokesman for Cox Communications).

⁵¹NPRM at ¶¶ 39, 41.

Moreover, the impact of any increased must-carry requirements would be felt immediately. The Commission's transition schedule for digital must-carry requires broadcasters in the top 30 television markets to construct their digital systems by next year. Many of the broadcasters in these markets have volunteered to, and will, begin transmitting digital signals in November of *this* year.⁵² Fifty-three percent of the nation's cable television subscribers reside in these top 30 television markets.⁵³ And, 418 broadcast stations, close to one-third of the nation's current broadcast station licensees, are located in these top 30 television markets.⁵⁴ Thus, imposition of digital must-carry requirements during the transition period would cause immediate disruption to over half of the nation's cable television consumers.

Already, in the wake of possible digital must-carry rules, the relatively few cable operators that have remaining channel capacity are being cautious in their addition of new programming services. One start-up cable network, Your Choice TV, cited the uncertainty created by proposed digital must-carry regulations as a major factor in its recent demise.⁵⁵ Even if some broadcasters do not begin transmitting a digital signal until 2003, which is highly unlikely given broadcasters' voluntary efforts to exceed the transition timetable to date, cable

⁵²*Statement by FCC Chairman William Kennard on Digital Television Transition*, «<http://www.fcc.gov/speeches/kennard/statements>» visited Oct. 7, 1998, 10:48 a.m. (According to NAB, 41 stations will begin digital broadcasts next month). Moreover, in its *Fifth Report and Order* adopting the digital broadcast transition rules, the Commission stated that its surveys indicated that 28 percent of responding broadcasters planned to convert to digital by 1999 (less than 4 months away) and 79 percent planned to convert by 2002. 12 FCC Rcd 12809 (1997) at ¶ 89.

⁵³AC Nielsen Cable Online Data Exchange.

⁵⁴*Id.*

⁵⁵CABLE FAX DAILY, *YCTV Closes Doors: Uncertain Times Cause Demise*, Aug. 4, 1998, at 1 ("Uncertainty over digital must-carry legislation made cable operators reluctant to make room for the service," according to YCTV Vice President Julie Lucas).

operators will simply stop adding new cable networks now to make room for anticipated future must-carry demands.

B. New And Emerging Networks Would Be The First Program Sources Displaced By A Digital Must-Carry Requirement.

Channel-locked systems forced to drop cable networks to accommodate digital must-carry demands are not going to drop established channels such as CNN, ESPN, HBO or Disney, that have had sufficient time to develop loyal subscriber followings, that cater to broad audiences, and that have become virtually indispensable to cable operators' channel lineups. Instead, cable systems already have indicated to Commenters that the first channels that are likely to be dropped to accommodate increased carriage mandates are developing, niche programming networks.⁵⁶ Not only would developing networks be dropped from capacity-poor systems, their chances of gaining access to those relatively few channels that remain available would be slim to none. After all, over 300 networks are likely to be competing for that limited channel space.⁵⁷ Thus, developing networks would be unable to increase distribution to the levels needed to become and remain commercially viable, would immediately be forced to decrease or halt their investment in quality, original programming, and many would ultimately fail. Emerging networks would never have the chance to get off the ground, and any plans to launch new networks certainly would be tabled.

⁵⁶Others also have acknowledged that marketplace economics would dictate which channels are dropped to accommodate digital signals. *See Pa Rep Fears Digital Must-Carry*, MULTICHANNEL NEWS ONLINE, Sept. 30, 1998 (Pennsylvania lawmaker Mary Jo White concerned that digital must-carry would severely threaten networks "not contributing to the revenue of the local cable operator.").

⁵⁷NCTA CABLE BOOK at 27-142.

Moreover, it cannot be assumed that program networks will be insulated from the impact of digital must-carry by ultimately gaining access to cable operators' digital tiers, for such tiers are not an adequate substitute for reduced analog capacity. First, the majority of cable systems have not deployed, and are not ready to deploy, digital transmission.⁵⁸ Second, cable operators' digital channels typically are grouped in a separate tier, which generally is comprised of a group of developing, niche networks and for which there is a separate charge for the digital service tier and the equipment required to receive the tier. Thus, a substantially smaller subset of cable subscribers is likely to purchase cable operators' digital tier, as opposed to the basic or CPST tiers.⁵⁹

C. The Costs To Consumers Imposed By A Digital Must-Carry Requirement Greatly Outweigh Any Perceived Benefits.

Consumers will be the ultimate losers if cable systems are forced to provide additional channels to broadcasters. Very few consumers will have the financial or technical means to receive HDTV signals over cable now or in the near future. To receive the HDTV signal in HDTV format over cable, subscribers must purchase a digital television set. The sets, which presently are available in only a few major United States cities, cost between \$5,500 and

⁵⁸See Jim McConville, *Cable Networks Take Risky Plunge Into Digital*, ELECTRONIC MEDIA, March 9, 1998, at D2 ("Paul Kagan estimates 500,000 homes will be passed by digital set-top boxes by year-end, 2.7 million by 1999 and 5.4 million by the year 2000.").

⁵⁹*Id.* ("digital networks can't expect to pull in the same 60-40 ad revenue-to-subscriber fee split as their analog predecessors nor reach as many subscribers."); Linda Moss, *Sci-Fi Tries Incentives To Fuel Growth*, MULTICHANNEL NEWS, Oct. 5, 1998, at 10 (quoting USA Networks President, Stephen Brenner, explaining that "[n]ew product tiers have not done as well as people thought they would . . . They're tough to market.").

\$12,000.⁶⁰ The cheapest models require a separate receiver selling for \$1,000 or more.⁶¹ In addition to the television set, consumers will need a cable box to receive the signal from the cable headend. Finally, consumers will not be able to view the HDTV signal without a 1394 "fire-wire" connecting the receiver with the digital television set, but the "fire-wire" is not yet available. Those consumers that do not have all of this equipment will not be able to receive the HDTV signal over cable and will see either a blank screen⁶² or a second version of the broadcast station in analog format.⁶³

Even the small subset of high-income consumers that can afford to purchase all of the necessary equipment to receive HDTV signals over cable will not benefit from digital must-carry. Most stations initially will broadcast only one hour of programming per day in HDTV format.⁶⁴ Even after broadcasters are transmitting the bulk of their signal in digital format, chances are

⁶⁰Todd Wallack, *Seeing the Future; HDTV Might Not Be An Immediate Turn-on; Gradual Impact Seen for HDTV*, THE BOSTON HERALD, Sept. 7, 1998, at 35; Evan Ramstad, *Matsushita Digital TVs to Debut in U.S. Stores*, THE WALL STREET JOURNAL, Aug. 3, 1998, at A3.

⁶¹*Id.*

⁶²Joseph J. Collins, Chairman and CEO Time Warner Cable, before the Committee on Commerce, Science and Transportation, United States Senate, Washington D.C., July 8, 1998 (Transition to High Definition Television); *see also* NPRM at ¶25 n. 77 (while digital set top box will pass through HDTV signal, without a digital receiver, and without any translation to an NTSC format, the display would likely show white snow).

⁶³To receive the analog version of the signal, subscribers will need to have a digital cable box.

⁶⁴Todd Wallack, *Seeing the Future; HDTV May Not Be an Immediate Turn-on; Gradual Impact Seen for HDTV*, THE BOSTON HERALD, Sept. 7, 1998, at 35 ("Not every show can be put on the air in digital format right away, even if a station has an HDTV transmitter. In-studio interview shows, for example, would need to be taped with all-new digital equipment. [One Boston network affiliate] says it will replace its studio equipment, but slowly."); Glen Dickson, *ABC Taps Tieman for DTV Gear*, BROADCASTING & CABLE, July 27, 1998, at 10, 11 (HDTV programming to be transmitted only in prime time).

high that the high-income cable viewer will then be receiving two channels with identical content -- one in digital and one in analog. In short, both sets of consumers will receive unnecessary, duplicative signals and be deprived of high quality, diverse cable programming services, to which more and more consumers are looking to fill their information, cultural, educational and entertainment needs.

In that light, the Commission's proposal is astounding, especially given Congress' and the Commission's nonduplication regulations, which are expressly intended to guard against cable's carriage of duplicative broadcast signals.⁶⁵ In adopting the current nonduplication rules in 1989, the Commission noted its concern that the rules "operate to foster competition among the various program providers and promote a greater diversity of programming for viewers."⁶⁶ Nevertheless, the Commission now is considering digital must-carry rules that would actually *require* cable operators to transmit redundant broadcast signals.

If digital must-carry were imposed, not only would consumers see a substantial decrease in programming diversity and choice, consumers would realize few, if any, benefits that are not achievable through other means. Advanced technology exists that enables both cable and non-cable viewers to receive digital broadcast signals over the air, without cable. Today's advanced A/B switching devices permit cable television viewers to switch to an over-the-air broadcast

⁶⁵47 U.S.C. § 633.

⁶⁶*Cablevision Systems Corp.*, 11 FCC Rcd 14934 (1996) (denying cable operator's petition for waiver of network program nonduplication rules) (citing *Report and Order* in Gen. Docket 87-24, 3 FCC Rcd 5299, 5320 (1988), *on recon.*, 4 FCC Rcd 2711 (1989)); *see also Second Report and Order* in Docket No. 19622, 50 FCC 2d 829, 847 (1975) (emphasis added) (the prime time access rule "was designed to lessen the tendency of [broadcast] licensees which led them to carry network or off-network programming, *in order that the voices of other persons might be heard.*").

signal using a cable compatible remote control.⁶⁷ Moreover, antenna equipment has improved dramatically, and initial tests indicate that HDTV may be received over the air using antennas.⁶⁸ Subscribers wishing to receive HDTV signals off the air would need to purchase a digital television set with a receiver, any necessary equipment to receive the signal off the air (such as an antenna), and a remote control with a switching mechanism. The cost of this equipment is not substantially greater than the cost of the equipment needed to receive the HDTV signal over the cable system, and would be relatively minor compared to the high cost of the digital television set and receiver, needed for *either* reception mode.⁶⁹

Not only would digital must-carry severely restrict consumer choice, consumers would likely see increased cable rates if digital must-carry were imposed, due to capital improvements necessary for cable operators to get digital signals to subscribers. The Commission acknowledged in its NPRM the colossal costs surrounding digital television transmission and that cable "rates may change if digital broadcast television stations must be carried by cable systems."⁷⁰

⁶⁷See NPRM at ¶ 16 ("[T]elevision reception via antennas has been made easier and more convenient than was the case earlier this decade. Legal barriers to over-the-air reception of broadcast signals, caused by restrictions on antenna placement, have been reduced because of the over the air reception device preemption provisions of the Telecommunications Act of 1996. Input selector ("A/B") switches, which allow the subscriber to switch between cable and an antenna, may now be built into television receivers and can be easily controlled from a TV remote control device.")

⁶⁸*Id.*; see also COMMUNICATIONS DAILY, July 31, 1998 at 9 ("tests by WGN-TV Chicago showed 96.4% overall success rate in receiving DTV signal, with vast majority of failures in 'concrete canyons' of downtown Chicago, near transmitter site").

⁶⁹For example, an off-air antenna may be purchased and installed for \$200 to \$300.

⁷⁰NPRM at ¶ 92.

V. THE COMMISSION'S CONSIDERATION OF DIGITAL MUST-CARRY AT THIS TIME IS PREMATURE.

Too many pieces are still missing from the digital television puzzle to create rules requiring cable carriage of digital broadcast signals. These missing pieces will make it impossible for the Commission to create the factual record necessary to develop, and justify, effective digital must-carry rules. The Commission should refrain from promulgating any digital must-carry rules until outstanding technical issues are resolved, the average consumer realistically can receive HDTV, and industry players have had an opportunity to negotiate carriage agreements.

A. Today's Digital Marketplace Is Filled With Uncertainty.

The Commission acknowledged the importance of developing a record in this proceeding.⁷¹ However, questions abound concerning the transition from analog to digital broadcast transmission. For example, it is still not clear whether broadcasters will use their free spectrum to transmit one HDTV signal, multiple SDTV signals, other information, or a combination. Without this information it is difficult to assess the full impact of digital must-carry on cable system channel capacity and competing cable programming networks. In addition, several complex technical issues still need to be resolved, including interoperability of broadcast stations and cable systems.⁷² In many cases, digital broadcast equipment will be tested for the

⁷¹NPRM at ¶ 16.

⁷²As recognized by FCC Cable Services Bureau Chief Deborah Lathen at a speech to the National Association of Minority Programmers at the Urban Markets Seminar on September 14, 1998, questions remain as to whether first generation digital television sets will be able to transmit an HDTV signal received through a cable television system. The industries are still in the process of creating the IEEE 1394 digital bus interface and debating whether to adopt QAM or VSB modulation. See Leslie Ellis, *CEMA Issues Fire-Wire Specifications*, MULTICHANNEL NEWS, Sept. 21, 1998, at 1 (reporting that CEMA

first time when stations begin transmitting in November.⁷³ The Commission recognized the unsettled state of digital broadcast television in its NPRM.⁷⁴

Even the length of the analog-digital transition period is uncertain. While the Commission's rules set a "target" date of 2006 for return of broadcasters' analog spectrum, broadcasters and legislators have already expressed their doubt that the analog signal will be returned by then.⁷⁵ Congress' decision to create a waiver process for broadcasters not ready to

introduced four technical standards differing from cable standards being developed by OpenCable Labs); *If DTV Sets Can't Display HDTV Programming*, COMMUNICATIONS DAILY, July 31, 1998, at 8-9.

⁷³Laura Evenson, *Transition Promises To Be Slow*, THE SAN FRANCISCO CHRONICLE, Sept. 3, 1998, at A13 (quoting vice president of engineering for Cox Broadcasting) ("The equipment is so rudimentary now that we're not even sure that the sound will be in sync with the picture . . . As for closed captioning, forget it. This is like 1948, all right. We don't even know that we'll be able to send a digital signal yet.").

⁷⁴*See, e.g.*, NPRM at ¶ 18 ("how the multiple technical systems [broadcast transmission, cable transmission and television receivers] will function in a digital environment *remains to be seen*. We note that the various technical elements involved in digital broadcast signal carriage are constantly in flux as technology advances."); ¶ 25 ("Significant issues arise as to how set top boxes will interact with the distribution of both digital cable and digital broadcast signals.")(noting that Open Cable initiative is still *pending*); ¶ 28 ("development of [interface] standard may not be proceeding as expeditiously as previously thought"); ¶ 29 ("It is *difficult at this point in time* to determine the technical abilities of the different digital set top boxes already distributed and in production, and how different cable operators will engage set top boxes in their business plans."); ¶ 30 (work is "*continuing*" on "copy protection" concern); ¶ 31("Whether [digital television receivers] will be capable of receiving QAM transmissions, and be built with a standard interface such as IEEE 1394, is less certain."); ¶58 (indicating that it is *not yet* clear how much bandwidth is required to transmit HDTV signal); ¶ 80 (channel mapping technology *is being developed* that "*may* alleviate the need for specific channel positioning requirements as subscribers will be able to locate a television station with little degree of difficulty")(emphasis added throughout).

⁷⁵Paige Albiniak, *Broadcasters Doubt 2006 Spectrum Return*, BROADCASTING & CABLE, July 13, 1998, at 19; *More Must Carry Madness: Roll Up The Sleeves on Firewall, Then Pontificate*, CABLEFAX DAILY, July 13, 1998, at 1 ("I will not see the return of spectrum in my lifetime," Senator McCain insisted").

give back their analog spectrum only adds to the uncertainty.⁷⁶ In fact, the transition may take over a decade to complete. Thus, the Commission should realistically assess the long-term impact that a digital must-carry requirement would have on cable television programming choices for consumers.

Moreover, bills are pending before Congress and regulatory issues remain to be resolved at the Commission that are likely to impact, or be impacted by, digital broadcast carriage. For example, Senate Commerce Committee chairman John McCain (R.-Ariz.) and House Telecom Subcommittee Chairman Billy Tauzin (R-La.) both recently circulated draft legislation that would phase in must-carry on direct broadcast satellite carriers that opt to offer local-TV stations.⁷⁷ In addition, Congressman Tauzin introduced a bill that would overhaul cable television rates and programming by forcing operators to collapse tiers and offer many services a la carte.⁷⁸ Moreover, the Commission still has before it many rulemaking proceedings that involve digital transmission issues including a rulemaking on the siting, placement and construction of broadcast station digital transmission facilities,⁷⁹ a petition for reconsideration of rules concerning the commercial availability of navigation devices,⁸⁰ and a rulemaking concerning fees for

⁷⁶*Balanced Budget Act of 1997*, Pub. L. No. 105-33, 11 Stat. 251 (1997).

⁷⁷Ted Hearn, Monica Hogan, *McCain Plugs Limited Must-Carry for DBS*, MULTICHANNEL NEWS, Sept. 7, 1998, at 10; COMMUNICATIONS DAILY, Oct. 5, 1998, at 5. While McCain subsequently tabled the bill due to disagreements between the DBS and broadcast industries, a McCain aide said it was possible the bill could be revived. Ted Hearn, *Feud Kills McCain's DBS Effort*, MULTICHANNEL NEWS, Oct. 5, 1998, at 3, 50.

⁷⁸Video Competition and Consumer Choice, H.R. 4352, 105th Cong. (1998).

⁷⁹*Notice of Proposed Rulemaking*, MM Docket No. 97-182, 12 FCC Rcd 12504 (1997).

⁸⁰*Best Path to Competitive Set-Top Market Proves Controversial*, COMMUNICATIONS DAILY, Sept. 25, 1998, at 4.

supplemental use of digital television spectrum.⁸¹ Clearly, it is important to resolve each of these issues, which relate integrally to cable operators' programming decisions, before imposing a digital must-carry requirement.

B. The Commission Should Permit Market Forces And Consumer Preference To Dictate When And How Digital Broadcast Signals Are Carried By Cable Systems.

The Commission has expressed its desire to let the marketplace dictate digital signal carriage issues.⁸² Indeed, in promulgating its rules for the transition from analog to digital for broadcasters, the Commission found:

We do not know what consumers may demand and support. Since broadcasters have incentives to discover the preferences of consumers and adapt their service offerings accordingly, we believe it is prudent to leave the choice up to broadcasters so that they may respond to the demands of the marketplace. A requirement now could stifle innovation as it would rest on a priori assumptions as to what services viewers would prefer. Broadcasters can best stimulate consumers' interest in digital services if able to offer the most attractive programs, whatever form those may take . . .⁸³

⁸¹*Notice of Proposed Rulemaking*, 12 FCC Rcd 22821 (1997).

⁸²Harry A. Jessell, *DTV or Bust, Says Kennard*, BROADCASTING & CABLE, Sept. 21, 1998, at 22; see also Ted Hearn, *FCC Chief Skeptical Of Must-Carry*, MULTICHANNEL NEWS, Sept. 28, 1998, at 8 (quoting Deborah Lathen, chief of the Cable Services Bureau, as saying that "no one should assume they have a right to be carried"); *Must Carry Madness: No Must Carry For You, Hints FCC Chmn Kennard*, CABLE FAX DAILY, Sept. 16, 1998, at 1 (Chairman Kennard expressed sentiment that market and not regulators should decide the issues involved with the transition to digital TV); *FCC has Broad Questions, No Answers, on Digital Must-Carry*, COMMUNICATIONS DAILY, July 10, 1998, at 2, 3 (quoting Commissioner Ness as stating "I firmly believe the industries can work together and will be working together" to solve carriage issue).

⁸³*Fifth Report and Order* in MM Docket 87-268, 12 FCC Rcd 12809 (1997) at ¶ 42.

Carriage negotiations presently are underway between cable operators and broadcasters.⁸⁴

At an absolute minimum, the Commission should wait to see how these market negotiations are resolved before forging ahead with rules that may do far more harm than good in the promotion of digital broadcast television.

VI. THE COMMISSION *MAY NOT* REQUIRE CABLE OPERATORS TO CARRY BOTH DIGITAL AND ANALOG BROADCAST SIGNALS.

Commenters' primary focus in these comments has been to show the Commission why any digital must-carry rules are not in the public interest and therefore *should not* be adopted. The fact is, however, that the Commission lacks the legal authority to impose digital must-carry and therefore *may not* require cable operators to carry both digital and analog broadcast signals.

A. The Commission Lacks Statutory Authority To Impose Additional Must-Carry Requirements On Cable Operators.

Section 614(b)(4)(B) states of the Communications Act states:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television *which have been changed to conform with such modified standards.*

47 U.S.C. § 534(b)(4)(B) (emphasis added). The language of the statute, which directs the Commission to initiate a proceeding to establish "any changes in the signal carriage

⁸⁴Paul Farhi, *Fees Weighed For High-Definition TV -- Networks, TCI Discuss Deals on Additional Monthly Charges for Service*, THE WASHINGTON POST, July 28, 1998, at E3 (describing negotiations between TCI and broadcasters); Paige Albinak, *Hindrey Sees DTV Deals Before Fall*, Broadcasting & Cable, July 27, 1998, at 36; Testimony Joseph J. Collins, Chairman and CEO Time Warner Cable, before Committee on Commerce, Science and Transportation, U.S. Senate, July 8, 1998 ("Time Warner currently is engaged in [digital broadcast carriage] negotiations and we are optimistic that we will reach successful carriage agreements in the not too distant future.").

requirements" of cable systems in order to ensure carriage of broadcast signals "which have been changed to conform" with the new advanced standards, is designed to ensure that the technical quality of the broadcast signal is maintained *after* a broadcast station converts to the new standard. Thus, must-carry applies only after the transition to digital has been completed, and broadcasters may not demand must carry for *both* their existing analog signal and any new digital signals, which may take the form of HDTV, multiplexed programming and/or data transmission.

The legislative history on this section is sparse, but highly instructive, and fully comports with this interpretation. The Conference Report states: "the conferees do not intend [Section 614(b)(4)(b)] to confer must carry status on advanced television or other video services offered on designated frequencies."⁸⁵ Taking Congress at its word, as the Commission should, it is clear that it did not intend to confer must-carry status on digital broadcast signals.

Under the broadest interpretation of the statute and legislative history (*i.e.*, by reading out of the statute the phrase "which have been changed to conform with such modified standards" as the broadcasters advocate), the most that can be said is that Congress deferred the question of digital must-carry to the Commission. But because of the serious abrogation of cable operators' and programmers' First Amendment rights and the enormous burden that such rules would impose on cable programmers and consumers, it is doubtful that a reviewing court would uphold rules that granted broadcasters "super carriage" rights during the transition period.

Finally, it is instructive that Congress did not alter the network non-duplication rule, which was firmly in place when it passed the Telecommunications Act of 1996. Section 614(b)(5) provides:

⁸⁵H. Rep. No. 104-458 (1996) at 161.

a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network.⁸⁶

There can be little doubt that two broadcast signals of a single broadcast station transmitting the same content "substantially duplicate" each other, even if one signal is in an analog format and the other is digital.⁸⁷ Congress recognized that such duplication would needlessly waste scarce cable channel capacity. Yet, new must-carry rules for DTV signals would create dual digital and analog must-carry rights and would flatly contradict Congress' desire to avoid redundant broadcast signals. Congress' decision not to require cable operators to squander valuable capacity lends strong support for the proposition that the Commission has no authority to promulgate such a requirement by administrative fiat.

In sum, the Commission lacks necessary statutory authority to impose a digital must-carry requirement.

B. A Digital Must-Carry Requirement Would Not Pass Constitutional Muster.

Clearly, mandatory carriage requirements infringe on the protected speech rights of both cable networks and cable operators. In *Turner Broadcasting System, Inc. v. FCC*, 580 U.S. 180, 117 S. Ct. 1174, 1198 (1997) ("*Turner II*"), Justice Kennedy explained:

The must-carry provisions have the potential to interfere with protected speech in two ways. First, the provisions restrain cable operators' editorial discretion in creating programming packages by "reduc[ing] the number of channels offered over which [they] exercise unfettered control." *Turner [I]*, 512 U.S. at 637, 114

⁸⁶47 U.S.C. § 534(b)(5).

⁸⁷The Commission apparently recognizes this when it states that digital broadcasts "will eventually carry identical content" of analog broadcast signals. NPRM at ¶ 39.

S. Ct., at 2456. Second, the rules 'render it more difficult for cable programmers to compete for carriage on the limited channels remaining.' *Id.*

Similarly, in his concurring opinion in *Turner II*, Justice Breyer further elaborated on the First Amendment implications of compulsory carriage of broadcast signals, stating:

[must-carry] extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This "price" amounts to a "suppression of speech."

117 S. Ct. at 1204 (citations omitted).

The analog must carry requirements survived First Amendment scrutiny only by the narrowest possible margins. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445 (1994) ("*Turner I*"), a plurality of the Court, applying intermediate scrutiny, upheld analog must-carry, notwithstanding its infringement of protected speech, because it preserved the benefits of free over-the-air television, promoted widespread dissemination of information from a multiplicity of sources, and promoted fair competition in the market for television programming.⁸⁸ However, the Court remanded the case to the district court to create a more fully developed factual record. On remand, a divided (2-1) panel granted summary judgment to the government.⁸⁹ On appeal to the Supreme Court for a second time, in *Turner II*, the Court, by a 5-4 margin, upheld the rules, relying in large part upon the substantial evidence supporting

⁸⁸*Turner I*, 512 U.S. at 642.

⁸⁹*Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995).

Congress' findings and the deference due the "predictive judgments of Congress" in making legislative decisions.⁹⁰

None of the justifications relied upon by Court to uphold analog must-carry are present in the context of digital must-carry. First, as recognized by the Court in *Turner II*, it owes far less discretion to the Commission than to Congress.⁹¹ In both *Turner* cases, the Court repeatedly emphasized that "the courts must accord substantial deference to the predictive judgments of Congress." 512 U.S. at 666; 117 S. Ct. at 1189.⁹² While there was little doubt about what must-carry obligations Congress desired for analog broadcast signals, Congress has not acted with respect to digital must carry. Indeed, the legislative history of the 1996 Telecommunications Act expressly states that Congress did not intend to "confer must-carry status on advanced television."

Second, as mentioned above, too many pieces remain outstanding in the digital broadcast puzzle to create an adequate record in this proceeding upon which any carriage requirement could be justified. As the true impact of a digital must-carry requirement is purely conjectural at this stage, there is no way for the Commission to develop an adequate record to promulgate carriage requirements that promote the public interest.

⁹⁰See, e.g., *Turner II*, 117 S.Ct. at 1189, 1199, 1201, 1203.

⁹¹*Turner II*, 117 S.Ct. at 1189 (reviewing statutory requirements "by a standard more deferential than we accord to judgments of an administrative agency").

⁹²See also *Turner II*, 117 S. Ct. at 1189 ("Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."); 117 S. Ct. at 1201 ("Congress' decision that use of A/B switches was not a real alternative to must-carry was a reasonable one based on substantial evidence . . . "); 117 S. Ct. at 1203 ("We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual finding supported by evidence that is substantial for a legislative determination").

Third, the stated justification for a digital must-carry requirement -- a smooth transition to digital broadcasting -- does not rise to the level of importance required to justify the substantial impairment of speech that necessarily results from a must-carry requirement. As the D.C. Circuit stated in *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985), "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." The record does not show how mandatory carriage rights are essential to a smooth transition. If anything, the record will show that cable operators are at the forefront of the transition to digital television and, over the last two years, have invested more than \$12 billion to upgrade their systems to provide digital television capabilities.⁹³

Fourth, technological developments in the reception of over-the-air broadcast signals and increased competition from alternative MVPDs have altered the landscape significantly such that cable may no longer be considered imperative to the distribution of broadcast signals. Input selector devices or A/B switches are now a viable alternative to compulsory carriage over cable systems. Used in conjunction with an antenna, A/B switches in the remote control enable the cable television viewer to transition easily from cable to broadcast. In addition, DBS providers are also offering local broadcast signals and developing their own digital transmission platforms.

Not only are the justifications for digital must-carry lacking, the harms are equal to, if not greater than, the harms created by analog must-carry. At an absolute minimum, broadcasters would likely exercise digital must-carry rights for an additional 6,000 signals, more than doubling

⁹³NCTA President Decker Anstrom, *Open Mike: Cable's Digital Efforts*, BROADCASTING & CABLE, Sept. 7, 1998, p. 71.

the number of must-carry demands currently faced by cable operators.⁹⁴ In other words, at a minimum, the burden on the cable industry would be *twice* as large as that which the Supreme Court barely found permissible for analog must-carry. As recognized by Justice O'Connor (joined by Justices Scalia, Ginsburg and Thomas) in her dissent in *Turner I*, must-carry:

implicates the First Amendment rights of two classes of speakers. First, it tells cable operators which programmers they must-carry, and keeps cable operators from carrying others that they might prefer. Though cable operators do not actually originate most of the programming they show, the Court correctly holds that they are, for First Amendment purposes, speakers. [*Turner I*, 114 S. Ct. at 2456]. Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place.

Second, *the Act deprives a certain class of video programmers--those who operate cable channels rather than broadcast stations--of access to over one-third of an entire medium.* Cable programmers may compete only for those channels that are not set aside by the must-carry provisions. A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers. . . . [*Cable programmers and operators stand in the same position under the First Amendment as do the more traditional media.*

512 U.S. at 675 (emphasis added).

As Commenters have shown, a digital must-carry requirement would cause the majority of the nation's cable systems to drop high quality, diverse networks in order to accommodate the must-carry demands of redundant, part-time digital broadcast signals, which could not be viewed by a huge percentage of the nation's viewers for at least several years. Clearly, there is no First

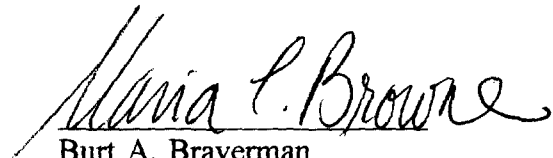
⁹⁴*Turner II*, 117 S. Ct. at 1198 ("It is undisputed that broadcast stations gained carriage on 5,880 channels as a result of [analog] must-carry.")

Amendment justification for such a digital must-carry requirement, and this time, the Court would strike down the requirement as unconstitutional.

CONCLUSION

For the foregoing reasons, Commenters respectfully request the Commission to consider the devastating impact that a digital must-carry requirement would have on developing, niche networks such as Commenters. Any such requirement would be unjustified by the record in this proceeding, would not pass statutory or constitutional muster and would not serve the public interest.

Respectfully submitted,

A handwritten signature in cursive script, reading "Maria T. Browne".

Burt A. Braverman

Maria T. Browne

COLE, RAYWID & BRAVERMAN, L.L.P.

1919 Pennsylvania Avenue, N.W.

Suite 200

Washington, D.C. 20006

(202) 659-9750

Attorneys for:

America's Health Network

Great American Country

Knowledge TV

Outdoor Life Network

Speedvision Network

The Golf Channel

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